IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2384 OF 2006

Siemens Information System Ltd., 130, Pandurang Budhkar Marg, Worli, Mumbai - 400 018. ..Petitioner.

V/s.

1. The Assistant Commissioner of Income-tax-7(2), Room No.624,. 6th Floor, Aayakar Bhavan, M.K. Mumbai - 400 020.

2. Commissioner of Income Tax-7, Room No.611, 6th Floor, Aayakar Bhavan, M.K.Marg, Mumbai - 400 020.

3. Union of India, through the Secretary, Ministry of Finance, North Block, New Delhi-110 001. ..Respondents.

Mr.Atul K.Jasani for petitioner.

Mr.Ashok Kotangale for respondents.

CORAM : F.I.REBELLO AND R.V.MORE, JJ.

DATED : 3RD JULY, 2007.

ORAL JUDGMENT (PER F.I.REBELLO, J.)

1. The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is carrying on business of software development and consultancy. The petitioner is regularly assessed to income-tax. The petitioner has several EOU/STP units engaged in the business of export of software. The

nature of business of these units is mainly on-site projects at customer's site abroad and off-shore projects, which are executed from India. The petitioner filed return of income for the assessment year 1999-00 relevant to the previous year ended 31st March, 1999 on 27th December, 1999 declaring loss of Rs.14,62,89,330/-. An intimation under section 143(1)(a) of the Act dated 8th February, 2002 was issued accepting the returned loss.

2. On 27th March, 2006 the respondent No.1 issued notice under section 148 of the Act in which it was stated that he had reason to believe that the petitioner's income chargeable to tax for the assessment year 1999-00 had escaped assessment within the meaning of section 147 of the Act. It was further stated that he proposed to reassess the income of the said assessment and directed the petitioner to furnish within 30 days from the date of service of the notice a return in the prescribed form. By a letter dated 10th April, 2006 the petitioner objected to the issuance of notice under section 148 of the Act and sought reasons recorded prior to the issuance of the said notice and without prejudice and under protest filed the return of income declaring the income as per the original return of income.

By letter dated 31st May, 2006 the respondent No.1 furnished a copy of the reason for re-opening the assessment for the assessment year 1999-00 which reads as under:-

> " In this case, return of income has been filed on 27th December, 1999 declaring total loss of Rs.14,62,89,337/-. This return of income has been processed under section 143(1)(a) of the Act on 8th February, 2002 accepting the returned loss.
>
> Perusal of the return of income for the A.Y. 1999-00 reveals that assessee's claim of loss is on account of losses incurred on Non 10A units. In A.Y. 2003-04, this issue of assessee carrying forward losses of Non 10A Units was examined and it was held that assessee has to set off losses of Non 10A units against income of 1OA units and thereafter, claim deduction u/s.10A of the I.T.Act on the balance amount. This interpretation is evident from the wording in the section allowing deduction u/s.10A of the I.T. Act which states that-
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> "Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertakings begins to manufacture or produce such articles or things or computer software, as the case may be shall be allowed from the total income of the assessee."
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> The decision of Bombay ITAT "E" Bench in the case of Navin Bharat Industries Ltd. V. DCIT 90 ITD 1 is applicable to the facts of the case, wherein, it has been held in principle that losses on non 10A units has to be set off against income of 10A units. In view of this, I have reasons to believe

> that income to the extent of Rs.14,62,89,334/- has escaped assessment within the meaning of section 147 of the I.T. Act. "

3. In response to the said reasons provided by the respondent No.1, the petitioner addressed a letter dated 7th July, 2006 objecting to the issuance of the notice under section 148 and stated that the reasons furnished by the respondent No.1 had quoted the provisions of section 10A as amended by the Finance Act, 2000 with effect from the assessment year 2001-02 and as such could not have been made applicable for the assessment year 1999-00 i.e. the year under consideration and, therefore, the notice has been issued under the mistaken belief about the correct position of law.

The respondent No.1 by reply dated 28th August, 2006, dealt with the objections filed by the petitioner and gave final opportunity to the petitioner to show cause as to why the loss claimed should not be disallowed to be carried forward by fixing the hearing on 14th September, 2006.

4. According to the petitioner, the notice dated 27th March, 2006 under section 148 of the Act to reopen the assessment for the assessment year 1999-00

is invalid, improper without jurisdiction and or in excess of jurisdiction and, therefore, liable to be quashed. At the hearing of this petition, on behalf of the petitioner, it is firstly submitted that notice under section 148 of the Act cannot be issued without there being reason to believe that any income has escaped assessment. In the alternate, the submission is that in fact no income has escaped assessment and consequently, the notice is liable to be quashed and set aside.

On behalf of the respondents, the learned counsel supports the notice and also relies on the Judgment of the Karnataka High Court in the case of **Commissioner of Income-Tax V/s. Himatasingike Seide Ltd.** reported in **(2006) 255 I.T.R. 255 (Karn.)**.

5. The first issue that we are called upon to answer is whether in fact, the respondent had reason to believe to enable him to exercise jurisdiction to issue the notice. We have already reproduced the contents of the notice containing reasons to believe wherein the respondent No.1 has relied on the provisions of law which were inapplicable in so far as the petitioner is concerned for the relevant assessment year. The relevant provision of law as it then stood, reads as

under:-

> " Section 10A(1) of the Income Tax Act as it stood at the relevant time read as under:
>
> "Special provision in respect of newly established undertakings in free trade zone, etc.
>
> 10A. (1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee. "

It would be clear from the reason given that the respondent No.1 proceeded on the presumption that the law applicable was the law after the amendment and not the law in respect of which the petitioner has filed the return of income for the year 1999-00. This by itself clearly demonstrates that there was total non application of mind on the part of the respondent No.1 and consequently, the notice based on that reason would amount to non application of mind.

The other reason given was the Judgment in the case of **Navin Bharat Industries Ltd. V/s. DCIT ITD 1 [2004] 90 ITD 1 (Mum) (TM)**. Let us consider the issue in controversy in Navin Bharat Industries (supra). The issue was "the assessee is entitled to setting off the loss incurred by SEEPZ unit entitled for deduction under section 10A against other business

income of the assessee".

The Accountant member held that the assessee was entitled to set off the loss incurred by SEEPZ not against other business income of the assessee. The judicial member held that it was not allowable. The third member noted that the assessee had taken the benefit of the provision of section 10A for a period of three years, but for the relevant assessment year had not taken the benefit and opted to get the profits of the new industrial undertaking assessed under the normal provisions. On these facts, the learned third member held that a privilege cannot be to a disadvantage and an option cannot become an obligation and if the assessee does not want to avail of the benefit entitled in that respect for some reasons, that benefit cannot be forced upon him. It would be clear that the Judgment is not an authority for the proposition as to whether losses suffered being undisputedly covered by section 10A as it then stood could be set off against profits of other business income of the assessee or vice versa.

It would thus be clear that the respondent No.1 proceeded to issue notice under section 148, on non existing reasons and as such, the material relied

upon could not constitute ‘reasons to believe’. The notice on this count alone is to be quashed and set aside.

6. So far as the second contention is concerned, the learned counsel has drawn our attention firstly to the provisions of section 4 of the Act which sets out that any Act enacted by the Income Tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be be charged for that year in accordance with and subject to the provisions, including the provisions for the levy of additional income tax in respect of the total income of the previous year of every person. Our attention is invited to section 2(45). Total income means the total amount of income referred to in section 5, computed in the manner laid down in this Act. Next, our attention is invited to what is gross total income under section 80 B (5). The gross total income has been described to be the total income computed in accordance with the provisions of the Act before making any deduction under the relevant Chapter. A perusal of section 10A(1) at it stood at the relevant time clearly sets out that subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which the section

applies shall not be included in the total income of the assessee. In other words, it is clear that the income derived from an industrial undertaking by the assessee to which section 10A applies could not be included in the total income of the assessee. Once that is the case, the petitioner was right in filing the income by excluding the income of income in terms of section 10A.

The learned counsel for the respondents has drawn our attention to the Judgment of the Karnataka High Court in the case of Himatasingike Seide Ltd (supra) which was considering the provisions of section 10B. After perusing the facts in issue in this case and the facts before the Karnataka High Court, in our opinion the said case is not applicable to the facts of this case.

5. For the aforesaid reasons, the petition has to be allowed on both the counts. In the light of that, Rule is made absolute in terms of prayer clause (a).

(F.I.REBELL0, J.)

(R.V.MORE, J.)